IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No.....

MARCEL BANKE and GEORGE A. GLOOR,
Petitioners,
vs.
NOVADEL - AGENE CORPORATION,
Respondent

BRIEF IN BEHALF OF PETITIONERS

SUMMARY OF ARGUMENT

It is the Petitioners contention, that

1. When a litigant has been irregularly denied his day in Court, he has been deprived of property without due process of law.

2. A hearing on a motion to vacate a decree—void for lack of jurisdiction—does not confer jurisdiction *ex post facto* to validate the decree.

3. The judgment, in refusing to apply Michigan decisions is in violation of the Federal statute and decisions of this Court.

ARGUMENT

ORIGINAL JURISDICTION

The bill of complaint herein was filed by Respondent a New Jersey Corporation, against Petitioners, residents of the City of Detroit, Michigan, in the United States District Court for the Eastern District of Michigan, Southern Division, upon the jurisdictional ground of diversity of citizenship (R. 1). That makes applicable to this case the Federal statute, section 725 U. S. C. A. which provides:

> "The laws of the several states * * * shall be regarded as rules of decision in trials at common law, in the courts of the United States * * *."

In construction thereof this Court has determined that,

> "The rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute."
>
> *Erie Railroad Co. v. Tompkins,* 304 U. S. 64;
> *West v. American Telephone & Telegraph Co.,* 311 U. S. 223.

These rules grant controlling weight to the Michigan decisions upon the various questions herein involved.

METHOD OF ENTRY OF DECREE

The case being at issue ready for trial the Court Clerk assigned it on the pre-trial docket to Judge Ernest A. O'Brien for hearing on December 16, 1940, at 2 P. M. Counsel for the parties received notice of this hearing prior to December 9, 1940. On December 9, 1940, counsel

for Respondent, without notice to Petitioners, orally requested Judge Tuttle to enter a final decree. The decree was entered then and there without any findings of fact.

The Petitioners learning of the decree, filed a motion before Judge Tuttle to vacate the decree. Being without counsel the Petitioner Banke argued in person. Judge Tuttle denied the motion.

The method of the entry of the decree and the effect given by the said Court of Appeals to the hearing on the motion to vacate are prime factors in the instant application.

EFFECT OF DECREE

The Petitioners are the owners of a combination patent for cooling, aerating and dispensing beverages; the Respondent holds no such patent; the decree privileges the Respondent to manufacture and sell the apparatus covered by Petitioners' patent with immunity.

RULES OF CIVIL PROCEDURE

When Congress enacted the Act of June 19, 1934, Ch. 651 authorizing this Court to prescribe by general rules civil procedure in the district courts, it included therein a prohibition that:

> "Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant."

What is prohibited to this Court by the foregoing Congressional Enactment is prohibited to the district courts and each and every judge thereof. One of the substantive rights of a litigant is to present his proof.

> "Congress and the Legislatures of the states may modify and control rules of evidence and may apply

> new rules to pending causes of action, provided a party is not deprived of his right to present his proof."
>
> *Hass v. U. S.*, 93 Fed. (2nd) 427.

The rules adopted by this Court clearly maintain the substantive right of the litigant to present his proof upon a trial of the issues, unless, in so far as this case is concerned,

> "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." (Rule 12(c).)

The rules, (7,b) require motions to be in writing, with notice (6,d) thereof served upon the opposite party; Rule 52 requires that "the court shall find the facts specially and state separately its conclusions of law thereon." None of these rules were complied with, yet a Court, without authority, enters a final decree upon the pleadings.

A serious question of fact is involved in the pleadings. Did the Judge follow the rule announced by this Court?

> "Since the case proceeded to judgment upon the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true."
>
> *Postal Telegraph-Cable Co. v. City of Newport*, 247 U. S. 464.

Without findings of fact and conclusions of law this question cannot be answered, but it suggests another. The pleadings do not contain a copy of Petitioners' patent, how then was the Judge in a position, on the pleadings, to find that a combination of Respondent's mechanism, shown in Exhibit A, plus an aerating and dispensing equipment

did not infringe Petitioners' patent? Where is the basis that authorizes a permanent injunction restraining Petitioners from instituting any action in any court for infrigement on account of that form of combination?

DUE PROCESS

Did the entry of the *ex parte* final decree without a hearing on the merits, without a motion for judgment on the pleadings, without notice to Petitioners, without compliance with any of the rules of civil procedure deprive the Petitioners of property without due process of law contrary to the 14th amendment of the U. S. Constitution? The answer is found in decisions of this Court.

> "The essential elements of due process of law are notice and opportunity to defend."
>
> *Simon v. Craft,* 182 U. S. 427.

> "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."
>
> *Postal Telegraph Co. v. Newport, supra.*

VALIDITY OF DECREE

There is no dispute today between the writer and Judge Tuttle that the decree when entered was void; we contend further that no matter what happened since the entry, the decree is still void. Our reasons are threefold (1) All the rules were violated, (2) the Judge was without jurisdiction, (3) a motion to vacate a void decree does not confer jurisdiction *ex post facto.*

(1) The rules were violated.

We have stated the violations which deprived the Petitioners of substantive rights; we have observed that "notice and opportunity to defend" are "essential elements of due process"; we now desire to suggest that in the absence of an application in accordance with Rule 12(c) the court is without authority to enter a judgment on the pleadings.

The rule creates the authority to grant a judgment upon the pleadings. When the rule is not invoked in the manner therein prescribed, there is nothing before the court to act upon; with nothing before the court, most assuredly, the court is without authority to enter a judgment upon the pleadings.

When it is the substantive right of the litigant to present his proof, he should not be deprived thereof by any order or decree entered without authority. It is more important to all the people of the United States that the rules be observed, than that some way be found to validate an order entered in flagrant violation of all the rules.

(2) The Judge was without jurisdiction.

It will be recalled that when Judge Tuttle elected to enter a final decree herein the case was not on his docket, but was upon the docket of an associate District Judge, Ernest A. O'Brien.

> " 'Jurisdiction,' when applied to courts, is the power to hear and determine a cause or matter."
>
> *Cangdon v. Wayne Circuit Judges,* 76 Mich. 358.

> "When a court of competent jurisdiction has become possessed of a case, its authority continues subject only to the appellate authority, until the

matter is finally and completely disposed of; and meanwhile no court of co-ordinate authority is at liberty to interfere with its action."

MacLean v. Speed, 52 Mich. 257.

Judge O'Brien was "possessed of this case." It had been regularly assigned to him by the Court Clerk. Judge Tuttle did "interfere" by the entry of the *ex parte* final decree. At the time of the entry of the decree "the power to hear and determine" the case rested exclusively in Judge O'Brien. How extensive was Judge O'Brien's authority in the case? This Court has answered,

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause."

Wilcox v. Jackson, 13 Peters, 489, 509.

Judge Tuttle could not deprive Judge O'Brien of that authority or confer jurisdiction upon himself by his own act. The *ex parte* final decree entered by Judge Tuttle was void when entered, always has been, and still is void for lack of jurisdiction.

(3) A motion to vacate a void decree does not confer jurisdiction ex post facto.

"Where courts act without authority, their orders are nullities. They are not voidable, but void."

Eliot v. Piersel, 1 Peters 328, 340;
Wilcox v. Jackson, supra.

The said Circuit Court of Appeals held (R. 71) that the "vital irregularities" were "cured" by the hearing on the motion to vacate. No authorities were cited in support of this doctrine. It runs counter to the Michigan decisions.

"If want of jurisdiction affirmatively appears by the files, it would not be cured by testimony on a hearing."

Woodliff v. Citizens Bldg. & Realty Co., 245 Mich. 292.

"Jurisdiction of the subject-matter cannot be conferred on a court by consent."

J. F. Hartz Co. v. Lukaszcewski, 200 Mich. 230;
Nichols v. Houghton Circuit Judge, 185 Mich. 654;
Cofrode v. Wayne Circuit Judge, 79 Mich. 332.

"Where the defects are jurisdictional, no waiver can cut off the rights of the party or interfere with his right to complain."

Atwell v. Barnes, 109 Mich. 10.

"An objection to the suit for want of jurisdiction of the subject-matter is good at any time."

Gillen v. Wakefield State Bank, 246 Mich. 158.

In its decision of this one question the said Circuit Court of Appeals has so far sanctioned such a departure by the District Court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

MICHIGAN RULE

Under the Federal Statute and the decisions of this Court in the *Erie* and *West* cases, *supra,* the Federal Courts are obligated to apply to this case the Michigan Judicial decisions as "rules of decision" herein. We have pointed out digressions by said Circuit Court of Appeals on ques-

tions *supra*; we here request this Court's attention to a specific Michigan rule relating to the rights of a defendant in an independent action to enforce a decree rendered in a previous action between the same parties.

We argued the rule at the hearing and in the brief in application for rehearing we stated:

> "Whether the Michigan rule is a good rule or a bad one; whether this Court likes it or doesn't like it; under the law, until the Michigan Supreme Court nullifies it, this Court must apply the rule in all applicable cases" (R. 86).

What is the rule? Where recourse by original bill is had to the Court to obtain the benefit of its former judgment, the defendant in the second case has

> "the right to introduce testimony bearing upon the issues in the original hearing."
>
> *Pinel v. Pinel,* 178 Mich. 596.

In *Jerry v. McClintock,* 41 Mich. 492, wherein the rule was originally announced, defendant's counsel urged that the filing of the second bill, in virtue of its own force, opened the whole original cause, notwithstanding the decree. The opinion, sustaining that contention, concludes the consideration of the question of defensive rights with these words,

> "In fine it seems to have become settled that the court acting on the maxim that he who asks equity ought to do it, will meet the call made by the complaint on its justice to execute its previous decree by an application of its equitable discretion to the circumstances to see whether the decree is one which it would be just to enforce; and if not, then to change it to meet the requirements of equity or refuse assistance altogether."

With the issues in the second case that were not in the first case, it may not be at all necessary to introduce "testimony bearing upon the issues in the original hearing." However, under the Michigan rule the right to do so belongs to the petitioners, if to obtain justice, the occasion so requires. The Circuit Court of Appeals opinion, *contra* to the Michigan rule, not only deprives them of that right, but also denies a trial upon the new issues, for the stated reason that "appellants were bound by that decree as between the parties before the court," as "the decision of Judge Lederle was final."

Where new issues are involved between the parties, this Court has consistently announced a different rule:

> "The established rule in this court is that if, in a second suit between the parties, a claim or demand different from the one sued upon in the prior action is presented, then the judgment in the former cause is an estoppel 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' "
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> *Larsen v. Northland Trans. Co.*, 292 U. S. 20.

APPLICATION OF THE TWO RULES

If the Petitioners were plaintiffs in a second case against the Respondent the rule of this court would apply; not being plaintiffs, but defendants in a second case, for an enforcement of the decree in the first case, the Michigan rule is applicable and must be applied under the Federal Statutes and decisions of this Court in construction thereof.

The rule of this Court confirmed in the *Larsen* case does permit a second trial between the same parties upon "a claim or demand different from the one sued upon in the prior action." Michigan has the same rule,

> "To be *res adjudicata* the questions must have been actually litigated and determined in the former suit."
>
> *Smith v. Fato,* 285 Mich. 361.

No rule, either of this Court or of the Michigan Supreme Court estops the Petitioners from instituting an action against Respondent upon a claim different from the prior action; and yet, an injunction issued, restraining Petitioners, beyond the scope of Judge Lederle's decree, upon matters that were not "litigated and determined" in the former suit.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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Of Counsel.